FOR ARGUMENT

Supreme Court, U. S.
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In the Supreme Court

of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC., and
RAMONA BENNETT,

Petitioners,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, and NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS,

Respondents.

RESPONSE OF NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS TO AMICUS CURIAE BRIEF OF THE UNITED STATES

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INDEX

	Page
Table of Authorities	i
Argument	1

TABLE OF AUTHORITIES

Cases

Blonder-Tongue Laboratories v. *University of Illinois Foundations*, 402 U.S. 313 (1971)	4
Davies v. *Metropolitan Life Insurance Co.*, 191 Wash 459, 71 P.2d 552, appeal dismissed, 306 U.S. 665 (1937)	2
Davis v. *Nielson*, 9 Wash. App. 864, 515 P.2d 995 (1973)	2
Eichler v. *Yakima Valley Transportation Co.*, 83 Wash. 2d 1, 514 P.2d 1387 (1973)	2
Knetsch v. *United States*, 364 U.S. 361 (1960)	3
Rutter v. *Rutter*, 59 Wash. 2d 781, 370 P.2d 862 (1962)	2
Safeway Stores, Inc. v. *Oklahoma Retail Grocers Ass'n., Inc.*, 360 U.S. 334 (1959)	2
Samvick v. *Puget Sound Title Insurance Co.*, 70 Wash. 2d 438, 423 P.2d 624 (1967)	4
United Automobile, Aerospace & Agricultural Implement Workers, Local 283 v. *Scofield*, 382 U.S. 205 (1965)	4
United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963)	3
United States v. *Washington*, 384 F. Supp. 312 (W.D. Wash., 1974) aff'd 520 F.2d 676 (9th Cir., 1975); cert. denied 423 U.S. 1086 (1976)	1, 3, 4
Walters v. *City of St. Louis*, 347 U.S. 231 (1954)	3

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ARGUMENT

The United States as *amicus curiae* argues on page 21 and 22 of its brief that *res judicata* and collateral estoppel bar Northwest Steelheaders Council of Trout Unlimited and Gary Ellis from litigating issues in this case because of the decision of Judge Boldt in *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash., 1974), aff'd 520 F.2d 676 (9th Cir., 1975, cert. den. 423 U.S. 1086 (1976). This conten-

tion must fail for any one of the following reasons:

1. The answer of Puyallup Tribe, Inc. and Ramona Bennett does not raise the issue of *res judicata* or collateral estoppel for the decision of Judge Boldt (App. 11-18). Under Washington law *res judicata* or collateral estoppel are affirmative defenses which must be raised by answer or be waived. *Davis* v. *Nielson*, 9 Wash. App. 864, 515 P.2d 995 (1973) (*res judicata* is an affirmative defense); *Davies* v. *Metropolitan Life Insurance Co.*, 191 Wash. 459, 71 P.2d 552, appeal dismissed, 306 U.S. 665 (1937) (defense of *res judicata* requires pleading and proof and cannot be raised by demurrer).

2. The assignments of error of Puyallup Tribe, Inc. and Ramona Bennett in their briefs to the Supreme Court of Washington do not raise *res judicata* or collateral estoppel for the decision of Judge Boldt. (Puyallup Br. 17-24; Bennett Br. 1-7, App. A-1-6). Under Washington law a matter not raised by assignment of error is waived. *Eichler* v. *Yakima Valley Transportation Company*, 83 Wash. 2d 1, 514 P.2d 1387 (1973) (arguments not assigned as error are not considered on appeal); *Rutter* v. *Rutter*, 59 Wash. 2d 781, 370 P.2d 862 (1962) (the Court will not consider an issue not raised in trial court or assigned as error).

3. Petitioners cannot raise in this Court a matter not presented to the courts below. *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Ass'n., Inc.*, 360 U.S. 334, 342 (1959) (appellant's claim which was not raised below will not be considered); *Walters* v. *City of St. Louis*, 347 U.S. 231 (1954) (this Court will not review what State Supreme Court below did not decide).

4. Even if *res judicata* or collateral estoppel are fairly comprised in the issue set forth in the Petition for Certiorari they are barely mentioned in the Petition for Certiorari and are waived. *Cf.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 334-35 (footnote 10) (1963) (issues not developed with any fullness before this Court are considered abandoned).

5. An *amicus curiae* has no standing to raise a new issue in this Court that was not appropriately raised by a party. *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960) (this Court refused to pass on an issue raised by the *amicus* but not by a party).

In addition to these five separate reasons which benefit all respondents, Northwest Steelheaders Council of Trout Unlimited and Gary Ellis can rely on these additional reasons:

6. The brief of petitioners in this Court does not seek to raise *res judicata* and collateral estoppel against Northwest Steelheaders Council of Trout Unlimited and Gary Ellis and the issues are waived. *Cf.*, *United States* v. *Philadelphia National Bank*, *supra*.

7. Northwest Steelheaders Council of Trout Unlimited and Gary Ellis were not parties in the case before Judge Boldt, *United States* v. *Washington*, supra, were denied intervenor status, and cannot be barred by

a case in which we were not parties.* *United Automobile, Aerospace & Agricultural Implement Workers, Local 283* v. *Scofield*, 382 U.S. 205, 213 (1965) (party denied intervenor status is not bound by *res judicata* rules; there the Court refused to consider the union bound by litigation conducted by the United States on its behalf); *Blonder-Tongue Laboratories* v. *University of Illinois Foundations*, 402 U.S. 313, 329 (1971) (litigants who did not appear in prior action may not be collaterally estopped); *Samvick* v. *Puget Sound Title Insurance Co.*, 70 Wash. 2d 438, 423 P.2d 624 (1967) (escrow agent who was not a party is not bound by prior litigation).

Respectfully submitted,

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* Judge Boldt granted all motions for intervention of Indian Tribes and denied all motions for intervention of commercial or sports fishing groups. One commercial group (the Reefnetters) was allowed to intervene by another judge during the period that Judge Boldt was on the Federal Pay Board and not involved with the case. Northwest Steelheaders were specifically denied intervenor status by Judge Boldt after the United States opposed the granting of such intervenor status. We were granted intervenor status on a similar showing by the period that Judge Boldt was on the Federal Pay Board and the trial court in this case and by the Ninth Circuit in *United States* v. *Washington*.